Re First Malaysia Finance Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D3-26-13 OF 1989
SITI NORMA YAAKOB J
30 NOVEMBER 1989

Companies and Corporations — Reduction of capital — Call on shares — Finance company falling insolvent — Intervention by Bank Negara — Petition for reduction of capital and for a call on shares and consolidation of fractional shares — Whether true and updated financial position of finance company disclosed — Powers of Bank Negara — Central Bank of Malaysia Ordinance 1958, s 31c

Statutory Interpretation — Explanatory statement — Whether explanatory statement attached to Parlimentary Bill an aid to construction — Provision expressed in present tense — Whether of retrospective effect — Whether provision penal in nature — Central Bank of Malaysia Ordinance 1958, s 31c

On 16 January 1989, Bank Negara had assumed control of the finance business of First Malaysia Finance Bhd ('FMF') under s 33(iii) of the Finance Companies Act 1969 following investigations into the financial standing of FMF. The investigations had revealed that FMF was hopelessly insolvent and no longer a viable concern as its paid-up capital had been impaired by heavy losses. Bank Negara later petitioned the court under s 31c of the Central Bank of Malaysia Ordinance 1958 for approval of a capital restructuring exercise which involved:

(1) a reduction of FMF's existing capital to one sen per $1 share, thereby reducing the existing paid-up capital of $20,274,000 to $202,740; and
(2) a call on the existing shareholders to pay a sum of 99 sen per share held by them so as to restore the par value of the shares to $1 each.

The petition was opposed by three shareholders. Their objections were:

(1) s 31c of the ordinance under which the petition was presented was not applicable;
(2) the true and updated financial position of FMF had not been disclosed to the court; and
(3) the amended second prayer of the petition, by which the consolidation of fractional shares was sought, fell outside the scope of s 31c.

Two of the opposing shareholders contended that s 31c was not applicable to them as (1) they had not been guilty of any unscrupulous dealings; and (2) the section was intended to be retrospective.

The explanatory statement attached to the Parlimentary Bill by which the ordinance was sought to be amended by the inclusion of s 31c stated that the purpose of the intended amendment was to prevent unscrupulous shareholders from retaining and benefitting from their equity stake after a bank or finance company had been rescued by Bank Negara. It was contended for the opposing shareholders that before s 31c could be applicable, there must be proof of unscrupulous dealings by shareholders of the bank or finance company.

No valuation of the securities held by FMF for debts incurred in 1986 and 1987 had been undertaken and it was contended that, since some of the securities were lands, an up to date valuation of the securities should have been undertaken so that a true picture of the actual losses suffered for the two years could be seen.

Held, granting the petition:

(1) An explanatory statement in a Parlimentary Bill can never be relied upon to interpret a provision in a statute as its presence in the Bill is merely to state the purposes and intentions of the Bill. All that Bank Negara needed to establish to invoke s 31c was to prove that FMF was an insolvent company as its capital had been lost or unrepresented by available assets.

(2) Section 31c is not penal in nature but it merely empowers the court to order the reduction of the share capital of a financial institution and to cancel its shares in instances where the capital of such a financial institution is lost or unrepresented by available assets.

(3) Since s 31c created a new disability which is penal in nature in respect of past events such as the losses already suffered by FMF since 1982, the section could only be interpreted to be prospective.

(4) While it was true that there was no disclosure of any revaluation undertaken of the securities held by FMF for the debts incurred in 1986 and 1987, no other evidence was available as to what extent such revaluation could make any difference to the amount Bank Negara had placed as the accumulated loss. In carrying out its functions under the ordinance and the Act, Bank Negara must have considered the securities held by FMF when arriving at the total losses suffered by FMF.

(5) It is true that s 31c does not make any provision for the consolidation of fractional shares but such a consolidation is part and parcel of the scheme for the cancellation of shares that the court was empowered to order under that section. Parliament was not concerned with the methods used to effect the cancellation of the capital of any financial institution but had left it to the wisdom of Bank Negara as the central bank of the country with supervisory powers over all financial institutions to find the most beneficial solution with regard to the cancellation of capital, provided of course it did not work to the detriment of any shareholder holding fractional shares.

[*Editorial Note*: The first and second opposing shareholders have appealed to the Supreme Court vide Civil Appeal No 02-29 of 1989.]

Legislation referred to
Central Bank of Malaysia Ordinance 1958 s 31c
Finance Companies Act 1969 ss 8, 19, 33(iii)

C Das (*John Mathew* with him) for the petitioner.
RR Sethu for the first and second opposing shareholders.
MS Murthi for the third opposing shareholder.

Cur Adv Vult

Siti Norma Yaakob J: On 16 January 1989, Bank Negara assumed the control of the financing business of First Malaysia Finance Bhd ('FMF') under s 33(iii) of the Finance Companies Act 1969 ('the Act'), following investigations conducted by the bank as to the financial standing of FMF. The investigations revealed that FMF is hopelessly insolvent and no longer a viable concern as its paid-up capital, unimpaired by losses, fell well below the statutory minimum requirement of $1m as prescribed under s 8 of the Act and that it holds risk assets in excess

of the permissible maximum ratio of 15 times its shareholders funds in contravention of s 19 of the Act.

Following the assumption of control, Bank Negara petitioned the court under s 31c of the Central Bank of Malaysia Ordinance 1958 for a capital restructuring exercise which involves:

(1) a reduction of FMF's existing capital to one sen per $1 share, thereby reducing the present paid up capital of $20.274m to $202,740, thus effecting a cancellation of the present paid-up capital; and
(2) a call on the existing shareholders to pay a sum of 99 sen per share held by them so as to restore the par value of the shares to $1 each.

This rescue scheme is to reflect FMF's true financial position and the injection of new capital would enable FMF to comply with ss 8 and 19 of the Act for in the event the shareholders do not top up the eroded portion of the share capital and that no new shareholders will take up the shares, Bank Negara would do so.

Neither FMF nor its creditors object to the restructuring exercise but three of its registered shareholders ('the opposing shareholders'), namely, (1) First Holding Sdn Bhd, with a holding of 21.1%, (2) Datuk Dr Chen Lip Keong, with a holding of 17.3% and (3) Datuk Husain bin Mohamed, with a holding of 1%, oppose the petition strenuously. Apart from his personal holdings, Datuk Dr Chen is also the beneficial owner of the shares held by two nominees, Kemajuan Tenaga Sdn Bhd and Dato Abdul Rahman bin Hamzah who between them hold 46.8% of the total shares in FMF as trustees, thereby making Datuk Dr Chen a majority shareholder in FMF.

The objections raised by these opposing shareholders are:

(1) whether s 31c under which this petition is presented, is applicable;
(2) there is no true and updated financial position of FMF; and
(3) whether the amended prayer 2 of the petition falls outside the scope of s 31c.

It is the contention of at least two of the opposing shareholders that s 31c is not applicable to them as (1) they have not been guilty of any unscrupulous dealings, and (2) that section was intended to be retrospective.

The opposing shareholders rely on the explanatory statement attached to the bill that seeks to amend the Central Bank of Malaysia Ordinance 1958 with, inter alia, the inclusion of a new s 31c. The statement sets out that the purpose of the new s 31c is to prevent unscrupulous shareholders from retaining and benefitting from their equity stake after the bank or finance company has been rescued by Bank Negara. Since s 31c speaks of unscrupulous shareholders, it was contended that there must be proof of unscrupulous dealings before s 31c can be applicable.

My answer to this contention is that first, an explanatory statement in a Bill can never be relied upon to interpret a provision in a statute as its presence in the Bill is merely to state the purposes and intentions why the Bill which in this case contains the proposed amendment has been presented to Parliament. By the time the proposed amendment becomes law, the intentions and purposes would have been debated at great length in Parliament and the end result is the Act containing the amendment on which I have now been asked to interpret. All that s 31c empowers is to enable the court to reduce the share capital of a financial institution by cancelling any portion of its paid-up capital which is lost or unrepresented by available assets. To that end, all that Bank Negara need to establish to invoke s 31c is that FMF is an insolvent company as its capital has been lost or unrepresented by available assets.

Reviews conducted by Bank Negara on the audited accounts of FMF for the years 1986 and 1987 show that FMF suffered losses since 1982 and such losses have accumulated to $114.108m as at 31 December 1987. The present net worth of its shares is negative and as such its capital is no longer represented by assets. It is operating in contravention of the risk assets ratio requirement and the minimum requirement of $1m, unimpaired by losses as prescribed under ss 19 and 8 of the Act.

Whilst not denying or disputing that the capital of FMF is in fact lost or unrepresented by available assets, the two opposing shareholders particularly, Datuk Dr Chen, who is also the executive chairman of FMF, attempted to show that they were not to be blamed for such losses, the bulk of which relate to non-performing loans. They contend that such loans were incurred by the previous management from whom the two opposing shareholders and the nominees of Datuk Dr Chen had purchased FMF's controlling shares of 11,979,333 pursuant to a sale and purchase agreement dated 28 December 1984. They contend further that as at the date of the purchase, they were not aware of the presence of such loans or their status. This cannot be right as the agreement has annexed to it a list of old and new loans and their outstanding balance as at 30 November 1984.

It is true that Bank Negara was aware of the purchase as it had sanctioned it on the understanding, inter alia, that the new shareholders inject funds of at least $25m to comply with ss 8 and 19 of the Act.

It was also expected that at least $53m would be realized from the purchase of the shares and this would form the additional capital required to make FMF a viable concern. Unfortunately, only $31m was realized as the difference had been utilized to set off the loans incurred by

the old management and out of the $25m which Bank Negara had stipulated to be injected into FMF, the new management only succeeded in bringing in $8.3m. These amounts were still not sufficient to sustain FMF's operations. As a result, Bank Negara imposed lending limits. FMF was only allowed to trade subject to a single customer lending limit of $500,000. Thus, to state that FMF's operations were suspended altogether cannot be correct. A further effort to increase FMF's capital by way of a rights issue was thwarted by a minority shareholder, Ganda Holdings Sdn Bhd, who obtained an injunction against FMF proceeding with its proposal to declare a rights issue. Burdened with these problems, Bank Negara was forced to inject $125m into FMF to keep it as a going concern.

It is the opposing shareholders' contention that as they had done everything in their power to rescue FMF, their conduct can never be equated to that of an unscrupulous shareholder and to that extent, s 31c is not applicable to them.

Whilst it is true that the opposing shareholders had come with a number of proposals to rescue FMF, the fact still remains that their efforts came to nothing as FMF continued to be riddled with debts. It cannot be denied that the active participation of particularly Datuk Dr Chen in the affairs of FMF is nothing more than a business venture for which expectations of profits must have been the one and only deciding factor which prompted him to purchase the controlling shares in FMF in the first place. Thus, when he became the executive chairman of FMF, he had not only to contend with bad debts but also the lending limits, which imposition Bank Negara was willing to relax if more funds were injected into FMF.

I consider that s 31c is not penal in nature but that it merely empowers the court to reduce the share capital of a financial institution and to cancel its shares in instances where the capital of such a financial institution is lost or unrepresented by available assets. Thus, to interpret s 31c as containing anything more than this is to put into that section words that are not there.

It has also been suggested that s 31c is not intended to be retrospective as it is expressed in the present tense. Since it creates a new disability which is penal in nature in respect of past events being the losses already suffered by FMF since 1982, the section can only be interpreted to be prospective.

As I have stated earlier, s 31c is not penal in nature and it is true that the events leading to FMF's present insolvency happened since 1982 and from that time until the present FMF has been in a continuous state of financial chaos. The present financial position of FMF that is now being considered is no more different from that in 1982 (apart from the fact that FMF's indebtedness has been accumulated) and as such no new disability has been disclosed today to warrant the opposing shareholders questioning the retrospective or prospective effect of s 31c.

Objection was also taken that there is no proper and updated valuation of the losses suffered by FMF for the years 1986 and 1987 to distinguish the good loan from the bad ones. The argument put forward is that since some of the securities for the loans are landed properties, a present valuation of such properties should have been done, so that a true picture can be seen of the actual losses suffered for the two years.

In its amended petition, Bank Negara has already set out in great detail the position of FMF's bad debts as at the end of 1986 and 1987 and has concluded that the accumulated losses suffered since 1982 amounted to $114.108m. It is true that there is no disclosure of any valuation done of the securities held by FMF for the debts incurred in 1986 and 1987 and apart from insisting that such securities be revalued, no other evidence is available as to what extent such revaluation can make any difference to the amount Bank Negara has placed as the accumulated loss. In carrying out its functions under the Central Bank of Malaysia Ordinance 1958 and enforcing the Act, I am sure that Bank Negara must have considered the securities held by FMF when arriving at the total losses suffered by FMF. For these reasons, I do not consider that the argument on revaluation can carry any weight whatsover.

Lastly, I come to the objection on that part of the amended prayer 2 of the petition that speaks of the consolidation of fractional shares as being contrary to s 31c.

It is true that s 31c does not make any provision for the consolidation of fractional shares but I consider that such a consolidation is part and parcel of the scheme for the cancellation of shares that I am empowered to order under that section. Parliament is not concerned with the methods used to effect the cancellation of the capital of any financial institution but has left it to the wisdom of Bank Negara as the central bank of this country with supervisory powers over all financial institutions, to find the most beneficial solution with regard to the cancellation of capital provided, of course, it does not work to the detriment of any shareholder holding fractional shares. Under the amendment to prayer 2 of the petition, fractional shares, following the consolidation, will not be cancelled, but instead will be treated as one share at $1 and will be credited as fully paid.

Since all the objections carried no weight, I had allowed Bank Negara's amended petition in terms of prayers 1-3 with costs to be borne by the opposing shareholders and to be paid to the petitioner.

The opposing shareholders had also applied for a stay pending their appeal to the Supreme Court. Since no

special circumstances were shown why I should exercise my discretion but on the contrary, such a stay would defeat the very purpose of the order I had just made, I had also dismissed the opposing shareholders' oral application for stay but granted them leave to appeal to the Supreme Court.

Petition granted.

Solicitors: *Shook Lin & Bok; RR Sethu; Murthi & Partners.*

Reported by *PS Ranjan*

Public Prosecutor v Vengadasalam & Ors

HIGH COURT (ALOR SETAR) — CRIMINAL REVISION NO 53-03-1987
LIM BENG CHOON J
25 SEPTEMBER 1988

Criminal Procedure — Witness — Defence counsel acting as witness for the prosecution — Jurisdiction of court to restrain counsel from appearing — Power of review of the High Court — Criminal Procedure Code (FMS Cap 6), s 323 — Courts of Judicature Act 1964, s 35

Legal Profession — Counsel acting as witness — Power of court to supervise advocate — Defence counsel appearing as witness for prosecution — Legal Profession Act 1976, s 102 — Legal Profession (Practice and Etiquette) Rules 1978, r 28(a)

Constitutional Law — Right to counsel of choice — Power of the court to interfere with right to counsel

By an order dated 12 October 1986, made by a magistrate, the accused persons' counsel, SP Annamalai, was removed from acting for the accused on the ground that he had been summoned to appear as a witness for the prosecution in the case against the accused. The accused applied to the High Court to review the magistrate's order.

Held, setting aside the order:

(1) The powers of revision of the High Court are left to be exercised according to the discretion of the judge. That discretion must be exercised according to the rules of reason and justice and according to law. There must be substantial ground or reason before a judge should invoke the power of revision conferred on him.

(2) It is a well settled principle of law that an accused person has a right to counsel. A court should, however, have the inherent jurisdiction to ensure that all trials are conducted justly and fairly. No person, least of all an advocate, should be allowed to interfere with or obstruct the performance of this duty by the presiding judicial authority.

(3) It is undesirable for an advocate to appear as a counsel in a trial when he is required to be a material witness. If an advocate, knowing that he is going to be a material witness, insists on appearing as counsel in the case, the presiding court has the jurisdiction to take the appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial. In the present case, the magistrate, therefore, had the jurisdiction to make an order restraining Mr Annamalai from acting for the accused persons.

(4) The court should, however, be slow to interfere with the right of a party to be represented by counsel of his choice, and a strong case must be made out before an order restraining the selected counsel from acting in a particular case can be made. In these circumstances, the onus of proof is on the prosecution to provide the court with some material to indicate that the counsel in question is a witness who is required to give material evidence.

(5) In the present case, the prosecution gave no indication as to why Mr Annamalai was regarded as a material witness. The only evidence adduced was the submission of the prosecuting officer that a statement was recorded from Mr Annamalai and that he was required to give material evidence. This was not sufficient. The order of the magistrate was therefore wrong and could not be sustained and was accordingly set aside.

Cases referred to

1 *Re Soo Leat* [1956] MLJ 54 (refd)
2 *Kok Heng Chow* v *Lay Mee Yin* [1948] MLJ 157 (refd)
3 *PP* v *Mah Chuen Lim & Ors* [1975] 1 MLJ 95 (refd)
4 *Lai Kwai Wah & Anor* v *PP* [1987] 1 CLJ 35 (refd)
5 *Phoon Liat Sum* v *PP* [1950] MLJ 205 (refd)
6 *Lodd Govindoss* v *Rukmani Bhai* AIR 1916 Mad 5 (refd)
7 *Re Kandan Padayachi* AIR 1938 Mad 873 (refd)
8 *Emperor* v *Dadu Ramu* AIR 1939 Bom 150 (refd)
9 *Re Chathukutty* AIR 1959 Kerala 119 (refd)
10 *Mahadevappa* v *Madaverappa* [1964] 1 Cri LJ 601 (refd)
11 *R* v *Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] 2 All ER 546 (refd)
12 *Yee Chang & Co Ltd* v *NV Koninklijke Paketvaart Maatschappij* [1958] MLJ 131 (folld)
13 *Myers* v *Elman* [1940] AC 282 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 35
Criminal Procedure Code (FMS Cap 6) s 323
Legal Profession Act 1976 s 102
Legal Profession (Practice and Etiquette) Rules 1978 r 28(a)

SP Annamalai for the applicants.
Malik Haji Ishak (State Legal Adviser) for the respondent.

Cur Adv Vult

Lim Beng Choon J: By letter dated 28 July 1987, a firm of advocates and solicitors drew the attention of this court to an order made by the learned magistrate on 12 October 1986 resulting in the removal of Mr SP Annamalai, an advocate and solicitor of the firm, from defending N Vengadasalam, N Appalasamy and M Subramaniam who were and still are named as the first, second and third accused respectively in the charge sheet of the criminal case registered as Alor Setar Magistrate's Court Arrest Case No A/A:244 of 1985 on the ground that Mr SP Annamalai had been summoned to appear as a witness for the prosecution in the same case. Apparently, Mr SP Annamalai was appointed by the three accused as their defence counsel in the trial of the said arrest case in which